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Opinion on remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW ARCADO FERNANDEZ, Defendant and Appellant.	B254191 (Los Angeles County Super. Ct. No. TA123646)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Remanded for sentencing hearing; otherwise affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Matthew Arcado Fernandez guilty of first degree murder and found true personal gun use and gang allegations. Fernandez appealed the judgment on the ground, among others, that his 50-years-to-life sentence constitutes cruel and unusual punishment under the Eighth Amendment because he was a juvenile when he committed the crime. In our prior opinion, we held that such a sentence may be the functional equivalent of life without the possibility of parole (LWOP), and we rejected the notion that Penal Code section 3051,[1] which grants a juvenile offender such as defendant a youth offender parole hearing in the 25th year of incarceration, cures the Eighth Amendment problem. We therefore remanded the matter for resentencing so that the trial court could reconsider defendant's sentence under the Eighth Amendment, but we otherwise affirmed the judgment and rejected Fernandez's other contentions.

The People's petition for review of our decision was granted. *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) held that section 3051 mooted the constitutional challenge to a sentence such as Fernandez's. The Supreme Court transferred Fernandez's case back to us, with the direction to vacate our decision and reconsider the cause in light of *Franklin*. Under *Franklin*, we must reject Fernandez's constitutional challenge to his 50-years-to-life sentence. Because Fernandez is entitled to a youth offender parole hearing in the 25th year of his incarceration under section 3051, *Franklin* dictates that his

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[1] All further undesignated statutory references are to the Penal Code.

Eighth Amendment challenge to his sentence is moot. We therefore affirm Fernandez's sentence but we remand the matter for the limited purpose of affording him an adequate opportunity to make a record of information that will be relevant to his future parole hearing before the Board of Parole Hearings. As we did in our prior, now vacated, decision, we reject Fernandez's contentions regarding the Fourth Amendment and exclusion of evidence.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background[2]

A. *June 15, 2012: the murder of Benjamin Juarez.*

On June 15, 2012, defendant shot and killed Benjamin Juarez. Juarez was found on the ground in an alley near a white car having no license plate. No weapons were in the car or on Juarez. Anthony Leon was with Juarez, but Leon did not witness the shooting. Juarez had four gunshot wounds. Blood and casings indicated that Juarez was shot while inside the car.

On the evening Juarez was killed, Lorena Toro was at home on South Washington Avenue in Compton. Hermenegildo Rojas lived across the street from Toro, and Toro knew Rojas, as well as Fernandez, Joseph Hodge, and Rigoberto Haro. Toro heard five gunshots sometime before 8:00 p.m. Looking outside, Toro saw Fernandez and Haro running to Rojas's house at 15521 South Washington Avenue. Rojas was walking behind Fernandez and Haro. Hodge was at Rojas's gate. Haro said, " 'We got him.

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[2] We do not discuss in depth, for example, DNA and other forensic evidence linking Fernandez and his codefendants to the crime, because Fernandez conceded he shot the victim, albeit in self-defense, and because they are not necessary to a resolution of the issues on appeal.

We got him.' " Although Toro did not see a weapon, Haro "had something" "like holding down."

Around this time, Deputy Miguel Fuentes responded to a call of an "assault with a deadly weapon, gunshot victim at the scene." After being directed to the 15500 block of South White Avenue (the area behind Rojas's house), a woman made eye contact with the deputy and pointed west. Based on information the woman gave the deputy, he looked for three male Hispanics. The deputy then saw three male Hispanics—Fernandez, Haro, and Hodge—arguing with a woman. She appeared to be telling the men to leave her property. The men, however, turned toward the rear of the property, and then Fernandez and Haro sat on a bench in front of the house. The deputy detained the men.

Although no weapons were found on any of the men, including Fernandez, the gun used to kill Juarez was recovered from Rojas's backyard.

B. *Fernandez's and codefendants' statements*

After they were arrested, Fernandez and his codefendants were in a patrol car, where their conversations were surreptitiously recorded. They made numerous incriminating statements about, for example, hiding the gun and Fernandez shooting Juarez. Hodge told Haro, for example, that "I think [Fernandez] Spooky shot in the head[,] dawg. . . . First shots were like in the head, pow, pow."

Fernandez admitted he was the shooter:

"That nigga from CG that nigga was tatted fool on his hand like in his face, on top of his eyebrows he has 'Chicano Ganga.' That's why when I pulled up, fool I looked and I'm like he looked like a rocker fool and I was like, hey fool, 'Where you from?' He's like, 'What?' And that fool tried to get off the car and fuck you

nigga." "I just started poppin' that nigga and I don't—and I ran dude fuck that."

"Yeah. The fuckin' driver got off. I guess he went to the house. When I looked I'm like what the fuck and he kept lookin' back fool like that. That's when I pulled up on him and with my hoodie on, I was like, 'Where you from?' And then he goes like, he looked at me like dogging me fool and I looked at his eyes like, 'Chicano ganga,' and I was like, that fool tried to get off the car, maybe try to face me, 'What?' And I was like hey nigga. Fuck you!"

"Hey, I think I shot that nigga in the nuts fool." "I, I only aimed for his dome fool like, when I saw him turn around this way, I just started shooting him like (inaudible). I know I shot him right here. I know I got him right here (inaudible)." "I don't know if he was dead (inaudible) four shots from up close."

C. *Gang evidence*

Detective Joseph Sumner of the Los Angeles County Sheriff's Department testified as a percipient witness (he assisted in arresting Fernandez, Hodge, Haro, and Rojas) and as a gang expert for the People. Compton Varrio Setentas (CV-70) is a Hispanic gang in Compton, and its members include Fernandez (Spooky), Haro (Indio), Hodge (Beast), and Rojas (Rage).[3] Rojas's house on South Washington Avenue is a CV-70 hangout. CV-70 claims the area Juarez was killed in. Juarez (Whisper) was an active member of Chicano Gang, a rival of CV-70. The territories claimed by the two gangs overlap.

Based on a hypothetical modeled on the facts of the case, it was the detective's opinion that the crime was committed for the

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[3] Fernandez testified that he is a CV-70 gang member.

benefit of, in association with, or at the direction of a criminal street gang.

D. *Defense case*

Between 4:00 p.m. and 5:00 p.m. on the day Juarez was murdered, three men went to Rojas's house and argued with Rojas. The men left but said they would be back.

Fernandez testified that, on June 15, 2012, he received a phone call telling him to watch out for rivals in the area. Fernandez went to Rojas's house, where he learned that three gang members had told Rojas there would be consequences if Rojas left the house. While at Rojas's house, Fernandez saw a white car with no license plate go by three times. People inside the car threw gang signs.

Fernandez waited for the car to leave before leaving Rojas's house with Haro and Hodge. While on their way to a friend's house, they took a shortcut through an alley, trying to avoid the people in the car. Fernandez, however, was startled by a voice calling from a parked car, " 'Fuck the ho's,' " which was a disrespectful way to refer to CV-70.[4] Fernandez, who could see "CVCG" tattooed on Juarez's face, asked Juarez where he was from. Juarez said, " 'What?' " With one hand Juarez tried to open the car door, and he held a gun in the other. Fernandez's friend said, " 'gun.' " Scared he would be shot, Fernandez, who had been shot the year before, pulled out his gun and pulled the trigger.[5]

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[4] According to Haro, he replied to Juarez by saying, " 'Fuck chi-chi's.' " Haro saw a gun in the car and ran.

[5] Fernandez began to carry a gun after he was shot.

Fernandez had never "run into" Juarez before, but he knew of him, specifically, that his moniker was Whisper and that Juarez "[p]retty much got out of prison, was trying to make his presence into the neighborhood again." Juarez was known to be a "[v]iolent guy."

II. Procedural background

Fernandez, Haro, Hodge, and Rojas were jointly tried by one jury. On September 16, 2013, the jury found Fernandez guilty of first degree murder (§ 187, subd. (a)) and found true personal gun use (§ 12022.53, subd. (d)) and gang (§ 186.22, subd. (b)(1)(C)) allegations. The jury hung as to Haro, Hodge, and Rojas, and the trial court declared a mistrial as to them.

On February 5, 2014, after denying Fernandez's request to have a "full-blown" sentencing hearing under the Eighth Amendment, the trial court sentenced Fernandez to 50 years to life (25 years to life for the murder plus 25 years to life for the gun enhancement). The court also sentenced Fernandez to a concurrent 15 years to life for the gang enhancement.

DISCUSSION

I. The motion to suppress

Before trial, Fernandez moved to suppress evidence,[6] under section 1538.5, on the ground his detention violated the Fourth Amendment.[7] We find that the trial court properly denied the suppression motion.

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[6] Fernandez moved to suppress his conversations with codefendants, his statements to the police, statements made by witnesses at the field lineup, the results of any GSR testing, the gun, and any other evidence that was the "fruit" of his detention.

[7] Fernandez raised this issue in a motion for new trial, which was denied.

A. *Testimony at the suppression hearing*

Deputy Fuentes testified at the suppression hearing in conformity with his later trial testimony. On June 15, 2012, at approximately 7:52 p.m., the deputy, who was in a marked police car and wearing a uniform, responded to a call of assault with a deadly weapon and a gunshot victim. "It might have been broadcasted" that the suspects were multiple male Hispanics. The deputy was initially directed to South Washington Avenue and East Myrrh Avenue, but he was redirected to the 15500 block of South White Avenue, which was behind 15521 South Washington Avenue, a location of interest. Within five to six minutes of the dispatch call, a woman on the street told the deputy that three male Hispanics ran " 'that way,' " toward South Butler Avenue.[8]

The deputy proceeded to South Butler Avenue, where he saw three male Hispanics (Fernandez, Hodge, and Haro) standing near the rear of a house, arguing with a Black woman. The woman was "agitated," and she asked the men to leave her property. She aggressively pointed to the street. The men "appeared to be nervous. They couldn't stand still." Fernandez and Haro sat on a bench to give, thought the deputy, the appearance they were visitors.

Deputy Fuentes got out of his patrol car, and the woman continued to direct the men to the street. It appeared to the deputy that the men did not want to walk toward him. Fernandez and Haro walked toward the deputy, but Hodge

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[8] At the preliminary hearing, Deputy Fuentes testified that the woman made eye contact with him and pointed in a westbound direction from the property.

continued to talk to the woman. The deputy, believing that the men might be involved in the assault, told them to come to him and to lie down.

Based on this testimony, the trial court found that there was a "crime broadcast" involving a gun. When the deputy was directed to the location, a woman told him three male Hispanics ran towards Butler, where the deputy saw three male Hispanics engaged in a heated "discussion" with a woman who was angrily pointing to the street. The men were "nervous" and "looking in different directions." The court concluded: "That certainly, under the circumstances, taken in totality of what happened, factors in. At that point I do believe there was a reasonable suspicion that these individuals might have been involved. [¶] On top of that, you look at how the defendants were acting, that the officer described them as being nervous, that they were looking in different directions. At one point they even faced the opposite way, like they were—you know, towards going back the way they came. One of the individuals didn't come out right away; it was—I think Mr. Hodge didn't come out right away when the officer commanded him to come out. [¶] So based on the totality of the circumstances, the suspicious behavior of the individuals, them matching up the general description of the people involved, the court is going to find there was [a] reasonable suspicion of criminal activity and the officer was justified in detaining them and doing further investigation."

B. *The detention did not violate the Fourth Amendment.*

The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures, including brief investigatory stops, by law enforcement personnel. (U.S. Const., 4th Amend.; *People v. Souza* (1994) 9 Cal.4th 224, 229.) A detention, however,

will not violate the Fourth Amendment "when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Souza*, at p. 231; see also *Terry v. Ohio* (1968) 392 U.S. 1, 21-22; *In re Tony C.* (1978) 21 Cal.3d 888, 893, abrogated on another ground as noted by *In re Devon C.* (2000) 79 Cal.App.4th 929, 931, fn. 2.) An "investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]" (*In re Tony C.*, at p. 893.)

We evaluate challenges to the admissibility of a search or seizure solely under the Fourth Amendment. (*People v. Carter* (2005) 36 Cal.4th 1114, 1141; *People v. Robinson* (2010) 47 Cal.4th 1104, 1119; *People v. Souza*, *supra*, 9 Cal.4th at p. 233.) When reviewing the denial of a suppression motion, we defer to the trial court's express or implied factual findings if supported by substantial evidence, but exercise our independent judgment to determine whether, on the facts found, the search or seizure was reasonable under the Fourth Amendment. (*People v. Lomax* (2010) 49 Cal.4th 530, 563; *People v. Redd* (2010) 48 Cal.4th 691, 719.)

The facts found by the trial court here support Fernandez's detention under the Fourth Amendment. Specifically, Deputy Fuentes received a call of an assault involving a gun. That call might have described the suspects as three male Hispanics. Near the crime scene, a woman told the deputy that three male Hispanics ran toward Butler. On Butler, the deputy saw three male Hispanics, including Fernandez, arguing with a woman who was telling them to get off her property. The men looked

"nervous" and appeared to want to avoid the deputy. (See, e.g., *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [nervous, evasive behavior is a pertinent factor in determining reasonable suspicion].) The totality of these circumstances objectively support a conclusion that the men had trespassed on woman's property to hide, because they were involved in the recent shooting.

Fernandez, however, analyzes the evidence in isolation, instead of viewing the totality of the circumstances. (*People v. Souza*, *supra*, 9 Cal.4th at p. 227 [lawfulness of a temporary detention "depends not on any one circumstance viewed in isolation, but upon the totality of the circumstances"].) He therefore points out, for example, that a person's "presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." (*Illinois v. Wardlow*, *supra*, 528 U.S. at p. 124; see also *Souza*, at pp. 240-241.) But defendant was not in an area of "expected criminal activity"; he was in an area where a serious crime involving a gun had very recently occurred.

Fernandez also argues that the description of the suspects—three male Hispanics—was too vague to justify his detention. (*In re Tony C.*, *supra*, 21 Cal.3d at p. 898 [description of burglary suspects as " 'three male [B]lacks' " was too vague to support detention of two Black minors].) But the description of the suspects here was possibly in the crime broadcast *and* the woman on the street told Deputy Fuentes that three male Hispanics went "that way." Following the woman's direction, the deputy saw three male Hispanics behaving suspiciously. The description of the suspects was therefore accompanied by information about the suspects' location. In any event, the

detention was not based solely on the suspects' description. It was based on Fernandez's presence in an area where a serious crime had just occurred; his nervous, evasive behavior; and Fernandez and his companions were being told to leave a woman's property. (See, e.g., *Illinois v. Wardlow*, *supra*, 528 U.S. at pp. 124-125 [the defendant's presence in a high crime area coupled with his flight upon seeing police officers gave rise to a reasonable suspicion he was involved in criminal activity].)

Fernandez also analogizes this case to *Florida v. J. L.* (2000) 529 U.S. 266. In *Florida*, the police received an anonymous phone call that a young Black man wearing a plaid shirt at a specific bus stop had a gun. (*Id.* at p. 268.) At the bus stop, officers saw three Black males, one of whom wore a plaid shirt, " 'just hanging out.' " (*Ibid.*) Based on the anonymous tip alone, the officers detained and frisked the men and found a gun on J. L., who wore the plaid shirt. Because the anonymous tip was unaccompanied by any "indicia of reliability," *Florida* found that the stop and frisk of J. L. violated the Fourth Amendment. (*Id.* at p. 274.)

Florida v. J.L. is distinguishable. The detention here was not based on an anonymous tip. The woman who told Deputy Fuentes which way "three male Hispanics" went was "anonymous" only in the sense that the deputy did not get her name. But even if we assumed that the woman provided an "anonymous tip," it had sufficient indicia of reliability. The deputy had just received a broadcast that an assault with a gun had occurred in the area, and that broadcast might have said that the suspects were three male Hispanics. Immediately after the "anonymous" woman told the deputy that three male Hispanics went "that way," the deputy saw three male Hispanics.

Unlike the defendant in *Florida* who was not acting suspiciously, Fernandez here was "nervous" and arguing with a woman and refusing to leave a woman's property. (See also *People v. Dolly* (2007) 40 Cal.4th 458 [anonymous 911 tip contemporaneously reporting an assault with a firearm and accurately describing the perpetrator, his vehicle, and its location was sufficient to justify investigatory detention].) Any anonymous tip was therefore corroborated and bore indicia of reliability.

We therefore conclude that Fernandez's detention was reasonable under the Fourth Amendment.

II. Exclusion of evidence concerning the victim's reputation

Fernandez contends that the trial court restricted his ability to introduce evidence of Juarez's reputation for violence, thereby depriving Fernandez of his constitutional rights to confront and cross-examine witness, to due process of law, and to a fair trial. (U.S. Const., 6th & 14th Amends; Cal. Const., art. I, § 15.) We disagree.

A. *Additional background.*

Before trial, Fernandez moved to introduce evidence of Juarez's prior arrest for gun possession. Defense counsel represented that Juarez had a reputation for carrying guns, and, on the day Juarez was killed, Juarez went to Rojas's house looking for CV-70 gang members. Later the same day, Juarez returned to the area. Fernandez went to see what Juarez was up to, and, at that point, Fernandez saw a gun and, fearing for his life, shot Juarez. Defense counsel argued that Juarez's prior arrest for gun possession was therefore relevant to Fernandez's state of mind and to self-defense. The trial court sustained the prosecutor's objection to the evidence for the purposes of opening

statements but took the issue under submission to see how the evidence "unfold[ed]."

Defense counsel raised the issue again, during Detective Sumner's expert gang testimony for the prosecution. The defense wanted to ask the detective about Juarez's "arrest history," because it went to Fernandez's "state of mind and his hypervigilance during this two-year feud which the detective indicates in his report existed between" Chicano Gang (Juarez's gang) and CV-70 (Fernandez's gang). The trial court sustained an objection "with regard to the victim's criminal history." But when defense counsel said that Fernandez would testify, the court agreed Fernandez could testify about what was going on in the neighborhood and how he feared people.

During cross-examination, Detective Sumner testified that Juarez was an "active member," although not an "O.G." of Chicano Gang. Juarez was "doing work." When defense counsel asked what "areas of activity" Juarez's gang "engages in," the trial court sustained a relevance objection to the question, as well as to the question, "What kind of work would he be putting in?" Detective Sumner then agreed that gangs have guns that they pass to each other, but when defense counsel asked if Chicano Gang operates the same way, the trial court sustained a relevance objection (although the court did not strike the detective's answer: "Yes").

Fernandez thereafter testified he did not know Juarez, but he had heard Juarez was a "violent guy." The defense then informed the trial court it would call Detective Sumner and ask what work Juarez put in for the gang; what was Juarez's reputation (including prior arrests and convictions); whether, hypothetically, fellow gang members will remove guns; and

whether a gang member recently out of prison will put in work to reestablish his good standing in the gang. This evidence, the defense argued, corroborated Fernandez's testimony that Juarez had a reputation for carrying concealed weapons.

The prosecution objected to the evidence and pointed out that Detective Sumner was not Juarez's arresting officer. Although defense counsel argued that the detective, as an expert, could rely on hearsay, the trial court found it was improper to introduce Juarez's rap sheet through Detective Sumner: "[T]hat's kind of twisting with regard to how an expert can use hearsay. In fact, it's really not offered for its truth; it's just to formulate the basis of their opinion with regard to, you know, a disease or gangs, . . . [¶] But here you are just asking him to read off, and then you will argue, 'He's a guy that has'—you know, 'has a bunch of convictions for guns.' That's basically why you're using it. So I don't think that's appropriate." The court also said it was "aware of [Evidence Code section] 1103,"[9] but it was simply "saying the vehicle in which you present it has to be the appropriate vehicle." The court recognized that "evidence of that nature does come in, but it has to be the proper vehicle . . . ." So long as a proper foundation was made, the court agreed that the detective could be asked about Juarez.

Detective Sumner then testified that he had five to 10 contacts with Juarez, who was in the company of other gang members. Because the detective did not handle Juarez's cases,

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[9] Evidence Code section 1103, subdivision (a)(1), permits a defendant to "offer[] evidence regarding the character or trait of a victim 'to prove conduct of the victim in conformity with the character or trait of character.' " (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827.)

the detective could not speak to Juarez's specific gang activities. But Juarez's gang engaged in the same criminal activities as CV-70, including burglaries, robberies, weapon and narcotics sales, and assaults. In the detective's expert opinion, Juarez was engaged in those activities.

B. *Fernandez's constitutional rights were not violated by any exclusion of*

evidence concerning Juarez's criminal history.

" 'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." ' " (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324; see also *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) Although this right can be abridged by evidence rules that infringe on the weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve (*Holmes*, at p. 324), the ordinary rules of evidence generally do not impermissibly infringe on the accused's right to present a defense (*id.* at pp. 326-327; *People v. Lucas* (2014) 60 Cal.4th 153, 270; *People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22).

Here, we disagree with Fernandez's premise that the trial court limited his ability to cross-examine Detective Sumner about, for example, Chicano Gang's activities, the work Juarez put in for his gang, and Juarez's reputation. The court ruled that defense counsel could ask Detective Sumner about Juarez's gang and Juarez's reputation, *if a proper foundation was established*.

And, although the court initially sustained objections to defense questions about Juarez's gang and what Juarez did in the gang, the defense was later permitted to ask these questions. Detective Sumner thus testified he didn't know what Juarez specifically did for the gang, but he believed that Juarez engaged in burglaries, robberies, weapons and narcotics sales, and assaults.[10] The detective said that Juarez, also known as "Whisper," was an "active" member of the Chicano Gang, a rival of CV-70. The detective also testified on direct examination that a "hood gun" was a gun passed around by gang members, "depending on who needs it." He agreed that gang members "back" each other up by getting rid of gun evidence. Defense counsel therefore was not precluded from asking about the activities of Juarez's gang, the work Juarez put in for the gang, and whether Chicano Gang passed guns around like other gangs.

We also disagree that Fernandez was not allowed to introduce Juarez's arrest history, which included arrests or convictions on gun-related charges.[11] The court ruled that Detective Sumner—who did not arrest Juarez—could not testify about Juarez's "rap sheet." The court did *not* rule that those arrests or Juarez's criminal history were inadmissible. Instead, the court agreed that Juarez's reputation was relevant but was

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[10] The detective's testimony is vague, but it can be interpreted to include a statement that Juarez's gang also engaged in weapon possession.

[11] The record is unclear, but it appears that Juarez had a 2004 conviction for shooting at an inhabited building or car, a 2005 conviction for having a concealed weapon, and a 2006 conviction for being a felon in possession of a firearm.

concerned with how defense counsel intended to get evidence about reputation from Detective Sumner: "That's why I asked what the personal knowledge of Detective Sumner was. That's what my issue was. I just need an offer of proof of how you get there, as opposed to just reading off a rap sheet. That's not going to happen. [¶] So I have no dispute about the end result, that, yes, I recognize that evidence of that nature does come in, but it has to be the proper vehicle . . . ." The court therefore said that Juarez's criminal history and reputation could come in; Fernandez was simply not allowed to have the detective, who had no personal knowledge of that history, read Juarez's rap sheet into evidence.[12]

Fernandez, however, argues that Detective Sumner "could review the rap sheet in forming an expert opinion as to Juarez's reputation for gun possession." Perhaps the detective could have

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[12] Indeed, it is not clear that defense counsel wanted to introduce Juarez's rap sheet. Defense counsel said he was not planning to ask Detective Sumner "to read off the rap sheet. I'm just going to ask him, 'Is he a gang member?' 'Is he an active gang member?' 'Did you have contacts with him?' 'In your expert opinion, when you say' . . . 'that he's active, putting in work, and in your expert opinion, what do you mean by that?' " The trial court had no problem with these questions: "I don't believe it's objectionable with regard to having Detective Sumner—especially since he is a detective that has been around a long time, and he certainly is familiar with CV-70's, but he also indicated on cross-examination he was familiar with the victim's gang, and I think that he can—a proper foundation certainly can be made with regard to his—maybe knowing about . . . the victim . . . and with regard to what [defense counsel] had just indicated. [¶] *So I have no problem with that. I had more of an issue with him just reading the rap sheet.*" (Italics added.)

relied on Juarez's criminal history to support an opinion, for example, that Juarez was a gang member. In any event, that is different than asking the detective to extrapolate a specific reputation in the community for gun possession from Juarez's arrests, in the absence of the detective's personal knowledge about Juarez's reputation in the community.

In any event, Juarez's prior gun-related arrests or convictions had limited probative value. They did not, for example, go to Fernandez's state of mind. Fernandez did not testify he knew that Juarez had prior arrests or convictions for gun possession. In fact, it is not clear that Fernandez personally knew Juarez. (See, e.g., *People v. Tafoya* (2007) 42 Cal.4th 147, 164-165 [evidence that witness was dangerous was relevant to defendant's claim of self-defense only if defendant knew of witness's reputation for dangerousness and was afraid of him].) Rather, Fernandez testified he had never "run into" Juarez but had merely heard of Juarez's "violent" character. Fernandez also did not testify that he *recognized* Juarez as the person he had heard about before shooting him. Juarez's alleged penchant for carrying guns was therefore irrelevant to Fernandez's state of mind.[13]

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[13] We note that the jury was instructed to consider, when deciding whether defendant's beliefs were reasonable, " 'all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.' " The jury was also instructed: "If you find that defendant knew that the victim had threatened others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable."

Evidence of Juarez's criminal history might have buttressed Fernandez's testimony he shot Juarez because Juarez had a gun.[14] But this issue, at its core, was one about the nature of gangs. Detective Sumner adequately addressed that issue. He testified, for example, about the importance of reputation in a gang and about different gang concepts, such as putting in work. He also specifically testified about the rivalry between Juarez's and Fernandez's gangs; that Juarez's gang was involved in criminal activities; that Juarez was a member of Chicano Gang with gang tattoos on his face; and that Leon, Juarez's companion near the time of his death, was also a member of Chicano Gang. Detective Sumner testified to his belief that Juarez was an active member of Chicano Gang and was involved in, among other things, sales of weapons. The detective's testimony therefore buttressed Fernandez's testimony that Juarez was a "violent guy" who had "got out of prison [and] was trying to make his presence into the neighborhood again."

Therefore, to the extent Fernandez wanted to establish that Juarez and Juarez's gang had a reputation for violence, Fernandez had that opportunity. Fernandez was not deprived of his constitutional rights to, for example, a fair trial and to present a defense. (See generally *People v. Gonzales* (2012) 54 Cal.4th 1234, 1258-1259 [exclusion of evidence that the defendant's wife had a family history of child abuse did not violate the defendant's right to present a defense]; *People v. Ayala* (2000) 23 Cal.4th 225, 269 [the defendant did not have either a constitutional or a state law right to present exculpatory

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[14] Fernandez's testimony that he saw Juarez with a gun was corroborated by Haro, who saw a gun in Juarez's car.

but unreliable hearsay evidence inadmissible under any statutory exception to the hearsay rule]). And even if we did agree that Juarez's rap sheet should have been introduced into evidence, this would still not be one of those rare cases where evidentiary error under state law violates due process by rendering the trial "fundamentally unfair," given that Juarez's gang's criminal activities were before the jury. (*People v. Partida* (2005) 37 Cal.4th 428, 436 [absent fundamental unfairness, state law error in admitting evidence is subject to the test in *People v. Watson* (1956) 46 Cal.2d 818; namely, whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error].)

III. Under *Franklin*, Fernandez's constitutional challenge to his sentence is moot.

Fernandez was 17 years old when he killed Juarez. For his crime, Fernandez was sentenced to 50 years to life. (See generally §§ 190, subd. (a), 12022.53, subd. (d).) Fernandez contended on appeal that his sentence was cruel and unusual under the Eighth Amendment, citing *Graham v. Florida* (2010) 560 U.S. 48 (LWOP may not be imposed on juveniles who commit nonhomicide offenses); *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455, 2463-2464] (*Miller*)) (mandatory LWOP may not be imposed on a juvenile offender; instead, the Eighth Amendment requires individualized sentencing); and *People v. Caballero* (2012) 55 Cal.4th 262 (a de facto LWOP sentence of 110 years may not be imposed on a juvenile nonhomicide offender). Based on those cases, we held that Fernandez's 50-years-to-life sentence might be the functional equivalent of LWOP. We also concluded that section 3051, which guarantees Fernandez the right to a "youth offender parole hearing" in the

25th year of his incarceration,[15] did not satisfy *Miller*'s requirement of individualized sentencing that takes into consideration, for example, the hallmark features of youth. (§ 3051, subd. (a)(1).)

Our California Supreme Court, in *Franklin*, concluded otherwise. *Franklin* held that section 3051 brings California's juvenile sentencing scheme into conformity with *Graham*, *Miller* and *Caballero*. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) In *Franklin*, the juvenile defendant, like Fernandez here, was sentenced to 50 years to life for first degree murder and for personal use of a firearm. *Franklin* said that such a sentence for a juvenile offender is of no constitutional moment, because section 3051 establishes the maximum amount of time (25 years for a juvenile in Franklin's and Fernandez's situation) a juvenile offender may serve before becoming eligible for parole. A sentence that permits consideration of parole eligibility during the 25th year of incarceration is neither LWOP nor its functional equivalent. (*Franklin*, at pp. 279-280.) Section 3051 therefore

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[15] The date of the parole hearing depends on the length of the juvenile's sentence. Juveniles, like Fernandez, sentenced to an indeterminate base term of 25 years to life are entitled to a parole hearing during the 25th year of their incarceration. (§ 3051, subd. (b)(3).)

rendered moot Franklin's challenge to his original sentence under *Miller*. (*Franklin*, at p. 280.)[16]

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[16] *Franklin* distinguished *People v. Gutierrez* (2014) 58 Cal.4th 1354, upon which some courts, including this one, relied in concluding that section 3051 did *not* cure the constitutional infirmity. *Gutierrez* considered section 1170, subdivision (d)(2), which allows youthful offenders to petition to recall their LWOP sentences after serving 15 years, and, if then unsuccessful, at subsequent designated times. (§ 1170, subd. (d)(2)(A)(i).) *Gutierrez* rejected the argument that the section "removes life without parole sentences for juvenile offenders from the ambit of *Miller*'s concerns because the statute provides a meaningful opportunity for such offenders to obtain release." (*Gutierrez,* at p. 1386.) *Gutierrez* noted that "*Graham* spoke of providing juvenile offenders with a 'meaningful opportunity to obtain release' as a constitutionally required alternative to—not as an after-the-fact corrective for—'*making the judgment at the outset* that those offenders never will be fit to reenter society.' [Citation.] . . . Neither *Miller* nor *Graham* indicated that an opportunity to recall a sentence of life without parole 15 to 24 years into the future would somehow make more reliable or justifiable the imposition of that sentence and its underlying judgment of the offender's incorrigibility 'at the outset.' [Citation.] [¶] Indeed, the high court in *Graham* explained that a juvenile offender's subsequent failure to rehabilitate while serving a sentence of life without parole cannot retroactively justify imposition of the sentence in the first instance: 'Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate *because that judgment was made at the outset*.' [Citation.] By the same logic, it is doubtful that the potential to recall a life without parole sentence based on a future demonstration of rehabilitation can make such a sentence any more valid when it was imposed. If anything, a decision to recall the sentence pursuant to section 1170(d)(2) is a

We are therefore compelled by *Franklin* to conclude that section 3051 similarly moots Fernandez's claims under *Miller*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Although *Franklin* held that section 3051 mooted any constitutional claim about imposing a 50-years-to-life sentence on a juvenile, there was a question whether Franklin "was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth. The criteria for parole suitability set forth in . . . sections 3051 and 4801 contemplate that the Board's decisionmaking at Franklin's eventual parole

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recognition that the initial judgment of incorrigibility underlying the imposition of life without parole turned out to be erroneous. Consistent with *Graham*, *Miller* repeatedly made clear that the sentencing authority must address this risk of error by considering how children are different and how those differences counsel against a sentence of life without parole '*before* imposing a particular penalty.' [Citations.]" (*Id.*, at pp. 1386-1387.)

In *Franklin*, our California Supreme Court, acknowledges it made these pronouncements but advises that section 3051 is different because it "effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years. Section 1170, subdivision (d)(2) has no similar effect on a juvenile offender's LWOP sentence; it provides that a juvenile offender may, after serving 15 years of an LWOP sentence, petition a court for recall of the original sentence." (*Franklin*, *supra*, 63 Cal.4th at p. 281.) Stated otherwise, section 3051 is different than section 1170.12, subdivision (d)(2) because the former guarantees parole review in 25 years, but the latter merely provides that the juvenile "may" petition for recall, which petition may or may not be sufficient to warrant a hearing.

hearing will be informed by youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense." (*Franklin*, *supra*, 63 Cal.4th at p. 269; see also *id.* at p. 283 [statutes "contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration"].) Because it was unclear whether Franklin had a sufficient opportunity to put on the record such information which would be relevant at the later youth offender parole hearing, the court remanded the matter to the trial court "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Id.* at p. 284.)

Here, Fernandez requested a sentencing hearing to address the *Miller* factors: "Mr. Fernandez cannot be sentenced to the 50-life without a lengthy hearing that examines his 'family and home environment,' 'the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him,' his 'inability to deal with police officers or prosecutors (including on a plea agreement),' his incapacity to assist his own attorneys,' and all of the other factors mentioned in Miller." The trial court denied his "motion with regard to having a full-blown hearing with regard to different aspects because I personally believe that, with a little bit of time in, we'll see where [Fernandez] is in his life with regard to his ability to parole or not. [¶] And I think, if you look at him now, this will be the worst time. He's sitting over

there, laughing, and he's the one that spoke up to me.[17] Honestly, it—he might benefit from this because at this point he might qualify as one of the worst of the worst and is eligible for LWOP or for a life sentence like this, based on the nature of the crime, based on his own words that were captured in the police car."

It therefore appears that Fernandez had information relevant to the *Miller* factors but was not given a sufficient opportunity to put it into record. That information would be relevant at his parole hearing, 25 years or so hence. Although Fernandez's 50-years-to-life sentence remains valid (*Franklin*, *supra*, 63 Cal.4th at p. 284), we remand this matter with the direction to hold a "baseline hearing" in conformity with *Franklin* (*id.* at p. 287 (conc. & dis. opn. of Werdegar, J.)).

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17 At the sentencing hearing, Fernandez defiantly spoke out of turn to the trial court.

DISPOSITION

The judgment is affirmed but the matter is remanded for the limited purpose of affording Fernandez an adequate opportunity to make a record of information that will be relevant to his future parole hearing before the Board of Parole Hearings.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.